

To: Legislator/Attorneys
From: Charles Gribble
Date: September 27, 2006
Re: Tribal Court Questions

I. IS THE TRIBAL COURT A COURT OF GENERAL JURISDICTION?

In a sense, the Tribal Court is a court of general civil jurisdiction. According to § 5-4101(a), the Tribal Court possesses "original jurisdiction over all civil causes of action and over all controversies between any persons." With that said, however, tribal jurisdiction over non-members exists only in limited situations.

In criminal cases, Indian Tribes do not possess jurisdiction to prosecute non-Indians. United States v. Lara, 541 U.S. 1628, 124 S. Ct. 1628, 158 L. Ed. 2d 1628 (2004).

In civil cases, Indian Tribes only possess civil jurisdiction over non-Indians where: (1) the cause is based upon the activities of the nonmember who has entered consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements; or (2) the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health of welfare of the tribe (e.g., tribe's ability to determine membership, regulate domestic relations among members, to prescribe rules of inheritance for members). Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

II. WHEN DOES THE TRIBAL COURT ASSERT PERSONAL JURISDICTION?

A. Tribal Court Civil Personal Jurisdiction.

Pursuant to § 5-4102(a) of the Tribal Code, the Tribal Court possesses personal jurisdiction over the following:

1. any person residing, located or present within the Settlement for purposes of any civil cause of action;
2. any person who transacts, conducts or performs any business or activity within the Settlement, either in person or by an agent or representative, for any civil cause of action arising from such business or activity;
3. any person who owns, uses, leases or possesses any property within the Settlement for any civil cause of action arising from such ownership, use, lease or possession;

4. any person who commits a tortious act or engages in tortious conduct within the Settlement, either in person or by an agent or representative, for any civil cause of action arising from such act or conduct;
5. any person who commits an act or omission which occurs, wholly or in substantial part, within the Settlement, by his own conduct or the conduct of another for which he is legally accountable, for any civil cause of action related to such act or omission;
6. any person who commits an act or omission outside the Settlement, but has or is intended to have substantial effect within the Settlement for any civil cause of action involving such act or omission or its effects;
7. any person who enters into a contract, agreement, or other consensual relationship with the Tribe or any of its members, for any civil cause of action arising from such contract, agreement, or other consensual relationship; and
8. any licensee or permittee of the Tribe for any civil cause of action arising from such person's activities as a licensee or permittee of the Tribe.

B. Tribe's Criminal Personal Jurisdiction.

The Tribe asserts personal jurisdiction in the following instances:

1. where the conduct constituting any element of the offense or a result of such conduct occurs on the Settlement;
2. where the conduct outside the Settlement constitutes an attempt or conspiracy to commit an offense on the Settlement and an act in furtherance of the attempt or conspiracy occurs on the Settlement;
3. where the conduct on the Settlement constitutes an attempt, solicitation, conspiracy or facilitation to commit or establishes criminal accountability for the commission of an offense off the Settlement that is an offense under the laws of the Tribe;
4. where the offense consists of an omission to perform a duty imposed by the laws of the Tribe regardless of the location of the defendant at the time of the offense; or

5. where the offense is a violation of the law of the Tribe that prohibits conduct outside the Settlement.

C. Limitations on Criminal Jurisdiction.

As discussed above, Indian Tribes do not possess jurisdiction to criminally prosecute non-Indians. United States v. Lara, 541 U.S. 1628, 124 S. Ct. 1628, 158 L. Ed. 2d 1628 (2004). Furthermore, pursuant to 25 U.S.C. § 1302(7), tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000 or both."

1. Examples of Crimes Committed by Non-Indian:

- a. If a non-Indian commits a traffic violation (*e.g.*, speeding, running stop sign) on settlement land, the Tribal Court possesses no jurisdiction over a criminal proceeding.
- b. A non-Indian commits an assault against an Indian on settlement land, the Tribal Court possesses no jurisdiction over a criminal proceeding.
- c. A non-Indian commits a drug and/or alcohol offense (*e.g.*, public intoxication, OWI, unlawful possession) on settlement land, the Tribal Court possesses no jurisdiction over a criminal proceeding.

2. Examples of Crimes Committed by Indians:

- a. An Indian commits an assault against a non-Indian on settlement land, the Tribal Court does possess concurrent jurisdiction over criminal proceeding (criminal case could also proceed in state court).
- b. An Indian commits an significant felony (*e.g.*, murder, kidnapping) on settlement land, the Tribal Court possesses concurrent jurisdiction over criminal proceeding but may not impose a sentence of greater than one year or \$5,000, or both (criminal case could also proceed in state and/or federal court).

D. Limitations on Civil Jurisdiction.

In civil cases, Indian Tribes only possess civil jurisdiction over non-Indians where: (1) the cause is based upon the activities of the nonmember who has

entered consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements; or (2) the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health of welfare of the tribe (e.g., tribe's ability to determine membership, regulate domestic relations among members, to prescribe rules of inheritance for members). Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

III. WHEN IS THERE CONCURRENT JURISDICTION?

Concurrent jurisdiction between the tribal court and state/federal courts exists with all aspects of case law, with the exclusion of those that relate to matters of purely tribal governance (e.g., membership determination, tribal constitutional construction, intra-tribal governing disputes). In these instances, the Tribal authorities possess exclusive jurisdiction.

IV. DO UNITED STATES CONSTITUTIONAL GUARANTEES APPLY?

The protections of the United States Constitution do not apply in tribal court actions brought against Indians in tribal courts. United States v. Benally, 756 F.2d 773, 779 (10th Cir. 1985). However, Congress has mandated that several rights guaranteed within the Bill of Rights are applicable to Indian Tribes. See 25 U.S.C. § 1302. These rights applicable to Indian Tribes include those akin to the First Amendment (freedom of religion, freedom of speech and press, freedom to assemble and petition for redress); the Fourth Amendment (right to be free from unreasonable search and seizures); the Fifth Amendment (prohibition against Double Jeopardy, prohibition against self-incrimination); the Sixth Amendment (right to confront witnesses; right of compulsory process; right to trial); the Eighth Amendment (prohibition against excess bail; prohibition against cruel and unusual punishment. Id. Congress granted such additional rights as equal protection and prohibition against ex post facto law/bill of attainder. Id.

Thus, while the U.S. Constitution does not apply per se, Congress has enacted legislation that prohibits Indian Tribes from exercising powers of self-governance in violation of number rights provided by the Bill of Rights.

Finally, as discussed above, Indian Court do not possess jurisdiction to criminally prosecute non-Indians.

V. WHAT IS THE IMPLICATION OF THE EXHAUSTION OF TRIBAL COURT REMEDIES IN CIVIL ACTIONS?

In Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa, 401 F. Supp. 2d 952 (N.D. Iowa 2005), Judge Reade addressed the doctrine of exhausting tribal remedies in the context of a civil

action brought by the Tribe in Tribal Court (the civil defendant then moved in federal court for injunctive and other relief).

The Court observed that "civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." Id. at 958 (quoting Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1419 (8th Cir. 1996)). The Court further observed that "the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself." Id. (quoting Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1299 (8th Cir. 1994)).

Finally, the Court observed that exceptions to the exhaustion requirement to exist, including: (1) exhaustion is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; and (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction. Id. at 959.

Based on these cases, in the context of civil cases arising on tribal lands: (1) *civil jurisdiction presumptively lies with the tribal court*, and (2) *questions concerning the jurisdiction of the tribal court and questions of sovereign immunity must be first submitted to the Tribal Court*. See e.g., Kishell v. Turtle Mountain Hous. Auth., 846 F.2d 1273, 1276 (8th Cir. 1987) (requiring exhaustion of tribal court remedies as matter of comity even though there was no pending tribal court action).

SUMMARY OF TRIBAL JURISDICTION OVER CRIMINAL MATTERS

DEFENDANT	VICTIM	CONCLUSION	LIMITATIONS	EXAMPLES
Indian	Indian	The tribal court possesses concurrent jurisdiction with state court to prosecute the offense. If crime is major crime listed in 18 U.S.C. § 1153, federal court also possesses concurrent jurisdiction.	According to 25 U.S.C. § 1302(7), tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both."	<ol style="list-style-type: none"> 1. Indian assaults an Indian on Indian land—tribal court possesses concurrent jurisdiction. 2. Indian commits theft against an Indian on Indian land—tribal court possesses concurrent jurisdiction.
Indian	Non-Indian	Tribal court possesses concurrent jurisdiction with state court to prosecute the offense. If crime is major crime listed in 18 U.S.C. § 1153, federal court also possesses concurrent jurisdiction.	According to 25 U.S.C. § 1302(7), tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both."	<ol style="list-style-type: none"> 1. Indian assaults a non-Indian on Indian land—tribal court possesses concurrent jurisdiction. 2. Indian commits theft against a non-Indian on Indian land—tribal court possesses concurrent jurisdiction.
Non-Indian	Indian	Tribal court does not possess jurisdiction.		<ol style="list-style-type: none"> 1. Non-Indian assaults an Indian on Indian land—tribal court possesses no jurisdiction to prosecute offense. 2. Non-Indian commits theft against an Indian on Indian land—tribal court possesses no jurisdiction to prosecute offense.
Non-Indian	Non-Indian	Tribal court does not possess jurisdiction.		<ol style="list-style-type: none"> 1. Non-Indian assaults a non-Indian on Indian land—tribal court possesses no jurisdiction to prosecute offense. 2. Non-Indian commits theft against non-Indian on Indian land—tribal court possesses no jurisdiction to prosecute offense.
Indian	No-Victim	Tribal court possesses concurrent jurisdiction with state and federal jurisdiction.	According to 25 U.S.C. § 1302(7), tribal courts cannot "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both."	<ol style="list-style-type: none"> 1. Indian commits traffic offense on Indian land—tribal court possesses jurisdiction
Non-Indian	No-Victim	Tribal court does not possess jurisdiction.		<ol style="list-style-type: none"> 1. Non-Indian violates speed ordinance on Indian land—tribal court possesses no jurisdiction to prosecute offense. 2. Non-Indian runs stop sign on Indian land—tribal court possesses no jurisdiction to prosecute offense.